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NO. 81-9

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees,

v.

STATE OF WASHINGTON, et al.,
Appellants.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Does a state statute which requires student assignment to the nearest or next-nearest school establish an impermissible racial classification where it contains exceptions for all common forms of nonneighborhood student assignment but racial desegregation, contains specific prohibitions against all major techniques of desegregation, and was enacted in order to terminate a well-publicized local school district's voluntarily adopted desegregation program?

2. Is the finding by the United States District Court for the Western District of Washington--that a racially discriminatory purpose was one of the factors which motivated the adoption of Initiative 350--supported by substantial evidence?

3. May a state prohibit all local school districts from adopting or continuing desegregation programs which include assignment of students to nonneighborhood schools?

4. Does protection of the constitutional rights of schoolchildren by school districts, school board members and individual private litigants constitute a "special circumstance" which would render an award of attorneys' fees unjust?*

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*A complete list of intervenor plaintiffs is set out in footnote 2 of the Jurisdictional Statement of the State of Washington. A complete list of the School District Appellees and the individual plaintiffs joined with them throughout this litigation is found at Appendix D of the state's Jurisdictional Statement.

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MOTION TO DISMISS OR AFFIRM

MOTION

The Appellee School Districts[1] respectfully move to dismiss the State of Washington's ("State") appeal or, in the

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[1] The parties filing this motion are the original plaintiffs in the district court. They include (a) Seattle School District No. 1 of King County, Washington; (b) Tacoma School District No. 10 of Pierce County, Washington; (c) Pasco School District No. 1 of Franklin County, Washington; (d) the Board of Directors of Seattle School District No. 1; (e) named individual

alternative, to affirm the judgment of the United States Court of Appeals for the Ninth Circuit. Sup. Ct. R. 16.1(c) and (d).

The jurisdictional statement filed by the State sets forth most of the statutes involved in this case. Also pertinent are 42 U.S.C. § 1983 and 42 U.S.C. § 2000d (Title VI, 1964 Civil Rights Act), set forth in the Appendix hereto.

The State's presentation of questions raised by this case is misleading.

STATEMENT OF THE CASE

This is an appeal from a judgment that the State of Washington's Initiative 350,

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(footnote 1 continued)

members of the Seattle School District Board of Directors, as Board members and with their spouses as guardians ad litem for their named Seattle student children, and (f) certain persons, individually and as guardians ad litem for their named Seattle student children.

which "was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments," is unconstitutional under the Equal Protection Clause of the fourteenth amendment. Seattle School District No. 1 v. State of Washington, 633 F.2d 1338 (9th Cir. 1980), aff'g in part, rev'g and remanding as to denial of attorneys' fees award, 473 F. Supp. 996 (W.D. Wash. 1979) (quote at 1015).

Both the district court and the court of appeals below determined, and the State of Washington does not dispute, that Initiative 350 legislatively differentiates between student assignment for the purpose of school desegregation and student assignment for any other significant reason, Finding of Fact No. 8.3, Seattle School District No. 1, 473 F. Supp. at 1010,

without the justification of a compelling state interest. The legal result of these factual determinations by the lower courts is automatic under Hunter v. Erickson, 393 U.S. 385 (1969), and Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971). Accordingly, there is no question upon which disposition of this case depends; further argument is not needed. Sup. Ct. R. 16.1(c). The questions presented by the State are not substantial.

The district court also held Initiative 350 unconstitutional because the court found the Initiative was motivated at least in part by the discriminatory purpose to impede school desegregation. The district court's findings of fact on this issue are supported by substantial evidence, and are not clearly erroneous. Fed. R. Civ. P. 52(a). Again, the legal result flowing from the facts found is automatic under

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). Accordingly, no substantial question exists; further argument is not needed.

The district court also found that Initiative 350 is overly inclusive in that it prohibits a school district from implementing a mandatory student assignment program even though the school district may be under a constitutional duty to eliminate segregation.

On appeal, the Ninth Circuit relied on the first ground above to find Initiative 350 unconstitutional. It did not reach the other issues. Seattle School District No. 1 v. State of Washington, 633 F.2d 1338 (9th Cir. 1980). The panel concluded that Initiative 350 creates an impermissible racial classification unsupported by any compelling state interest. Id. at 1342.

The State petitioned the Ninth Circuit for rehearing and suggested en banc determination. The State's petition was denied. Except for the lone dissenter on the Ninth Circuit panel, no judge on the Ninth Circuit voted to accept en banc determination.

The result in this case is controlled by Findings of Fact firmly grounded in the evidence. Thus, this Court should dismiss the appeal or affirm the judgment below.

STATEMENT OF FACTS

The Seattle School District No. 1, the Tacoma School District No. 10 and the Pasco School District No. 1 ("School Districts") have been committed for several years to achieving and maintaining racially desegregated public schools. That commitment is based on the School Districts' obligations under state and federal law, and on the School Districts' policy judgment

that racially integrated education is an important educational objective [Ex. 12].

One element of the School Districts' plans to achieve and maintain racially desegregated schools involves some student assignment to schools beyond their nearest or next-nearest schools. The plans were adopted by the locally elected Board of Directors of the School Districts, after lengthy processes of public hearings marked by extensive citizen participation and advice.

In Seattle, hearings revealed strong citizen desire for stability and predictability in student assignments, for neighborhood students and friends to remain together, and for the opportunity for voluntary alternatives to mandatory student assignments. The School Board established equity of movement as between majority and minority students and preservation of ethnic identity as essential features of

any desegregation plan. Accordingly, the Seattle Plan, as adopted by a vote of six to one in December 1977, "pairs" or "triads" elementary school attendance area resident populations, with exchanges of students between and among the paired and triaded schools according to restructured grade configurations. Thus, individual students are assigned initially not on the basis of their race, but together with all other students in their neighborhood. Secondary schools are desegregated by restructured feeder patterns; students who attend elementary school together also attend secondary school together. Magnet and other optional programs remain an integral part of the plan, and students may voluntarily select alternatives to their initial fixed assignments consistent with the District's desegregation goals. Thus, while the initial assignment for students involved in the Plan is "mandatory,"

extensive voluntary options remain available to students. [Ex. 7, Ex. 12, Findings of Fact 6.9, 6.10, 6.11, 6.12.][2]

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[2] The Seattle Plan has now operated successfully for three school years. The Seattle Plan's goal of eliminating racial imbalance has been achieved. In February 1981 the Seattle School Board adopted (again by a vote of six to one) a three-year plan for stable desegregation maintenance for 1981-84. Compare the facts of Martin v. Charlotte-Mecklenburg Bd. of Educ., 626 F.2d 1165 (4th Cir. 1980), cert. denied, 68 L. Ed. 2d 238 (1981). Contrary to the "conventional wisdom" that mandatory busing for desegregation causes substantial "white flight" and is therefore counterproductive to the goal of long-range desegregation, white student attrition in Seattle has been roughly the same in the three years of the Seattle Plan's operation as it was in the three years preceding the Plan. See Finding of Fact 11.3, Seattle School District No. 1, 473 F. Supp. at 1010-11. Test scores in Seattle have improved since the Seattle Plan began. In elections for two Seattle School Board seats in November 1979, when virtually the only issue which received media attention was desegregation, pro-Seattle Plan candidates defeated anti-Seattle Plan candidates.

Desegregation in Seattle is working, consistent with statements in the State's own Exhibit A-133 [Harris Poll] at pages ix, x and 40:

In 1978, opponents of the Seattle Plan for desegregation, in an attempt to halt operation of the desegregation program, developed and proposed Initiative 350 to the voters of the State of Washington. The Initiative makes it unlawful for local school boards or any state agency to assign students beyond their nearest or next-nearest schools for the purpose of school desegregation. Initiative 350 allows all other major types of student assignment to

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(footnote 2 continued)

> While there are whites who are still emotionally disturbed at the notion of busing for racial balance, the almost automatic claim that "busing is a disaster" simply does not hold up in the face of the facts from this study . . . . The irony of busing to achieve racial balance is that rarely has there been a case where so many have been opposed to an idea, which appears not to work badly at all when put into practice. . . . Among whites whose children have been bused for desegregation, 78% say the experience is satisfactory or highly satisfactory.

schools beyond their nearest or next-nearest schools. Only busing for desegregation was removed from the realm of local school district authority.

The voters of the State of Washington adopted the Initiative. In Seattle's predominantly minority 37th Legislative District, the Initiative failed.

The State attempts in its Jurisdictional Statement to minimize the impact of Initiative 350. The facts do not support the State's position. The Initiative would have an immediate and drastic segregative impact.

The district court found, and the court of appeals agreed, that under Initiative 350 the desegregation of a significant number of Seattle schools will be prevented and the school system will become more racially imbalanced. Initiative 350 will make it impossible for Tacoma to maintain

its present racial balance.[3] It is doubtful the Pasco schools can be desegregated within the "nearest or next-nearest" restrictions of Initiative 350.

The racial classification created by Initiative 350 involves the restructuring of the political process to the disadvantage of minorities. Seattle School District No. 1, 633 F.2d at 1344. Under the Initiative, desegregation plans which include mandatory student assignment, formerly a matter of local jurisdiction and control, are illegal unless and until a majority of the State's voters or the State Legislature

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[3] Although the State professes bewilderment at the presence of the Tacoma School District in the litigation (Jurisdictional Statement at 9), the undisputed evidence at trial was that some black students in Tacoma are denied admission to their nearest or next-nearest schools under the Tacoma desegregation plan. See, e.g., Finding of Fact 5.14. Thus, at least as to those students, the Tacoma plan is a "mandatory" one which would contravene Initiative 350.

agrees to repeal Initiative 350. Id. All other mandatory student assignments remain under local control.

GROUNDS FOR MOTION TO DISMISS OR AFFIRM

The questions raised by the State's appeal are not substantial. Existing law is clear on each question which this case presents. Thus, the State's appeal should be dismissed or, alternatively, the court of appeals decision should be affirmed.

A. Initiative 350 is Unconstitutional Because It Establishes an Impermissible Racial Classification.

The United States Court of Appeals for the Ninth Circuit and the United States District Court for the Western District of Washington correctly concluded that Initiative 350 establishes an impermissible racial classification. Because no compelling state interest justifies that classification, it must fall.

Both courts recognized that this case is governed by Hunter v. Erickson, 393 U.S. 385 (1969) and Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971).

In Hunter, this Court held that section 137 of the Akron, Ohio, City Charter violated the fourteenth amendment. The Charter provision prevented the City Council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of voters.

The Court found that section 137 created "an explicitly racial classification treating racial housing matters differently from other racial and housing matters." Id. at 389. The Court pierced the superficial neutrality of the provision and said that "although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that

the law's impact falls on the minority." Id. at 391. The Court applied the "suspect classification" test to the provision "[b]ecause the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race." Id. at 391-92. None of Akron's justifications for section 137 amounted to a compelling state interest. Therefore, the Court found that the provision violated the fourteenth amendment.

Justice Harlan's concurrence focused on the manner in which section 137 structured the political process in a nonneutral, racially discriminatory manner:

> Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest.

Id. at 395.

Such a provision is "discriminatory on its face," and must fall "unless it can be

supported by state interests of the most weighty and substantial kind"--which were not present in Hunter. Id. at 393.

A three-judge court held Hunter dispositive of the question presented in Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971). At issue was a New York statute which prohibited "state education officials and appointed school boards from assigning students, or establishing, reorganizing or maintaining school districts, school zones or attendance units for the purpose of achieving racial equality in attendance." Id. at 712.

Hunter, according to the court in Lee v. Nyquist, stands for the principle that "the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." Id. at 718.

The statute considered in Lee v. Nyquist had that effect. It "create[d] a single exception to the broad supervisory powers that the State Commissioner of Education exercises over local public education." Id. The exception "places burdens on the implementation of educational policies designed to deal with race on a local level," "operates in practice as a racial classification," is not excused by any "compelling justification," and is therefore a violation of the fourteenth amendment. Id. at 718-19. The Supreme Court left the lower court's opinion intact by summarily affirming.

Here, the court of appeals and the district court recognized that Initiative 350 is like the charter provision in Hunter and the statute in Lee. It creates a racial classification, treating racial student assignment matters differently from other student assignment matters. The

law's impact falls on the minority by dismantling operative public school desegregation programs, by preventing future local adoption of such programs, and by requiring expensive litigation for vindication of constitutional rights. The law is precisely targeted at voluntary local adoption of desegregation plans and thus specially burdens, indeed forecloses, the attainment through the local political process of important minority educational goals [Exs. 68, 94]. The law structures the political process in a nonneutral manner.[4]

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[4] In its Jurisdictional Statement at 15, the State refers to the case of Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978) ("the State Funding case"), as authority for the proposition that all matters of school governance are now the province of the State rather than the local school board, and thus Initiative 350 does not structure the process in a nonneutral manner. This characterization is inaccurate and immaterial. The State Funding case held unconstitutional the State's reliance on voter approval of

(footnote 4 continued)

special excess levy funding to discharge the State's "paramount" constitutional duty to make ample provision for education of its resident children. The Washington Supreme Court required the State legislature to define adequately "basic education" and to fund fully that "basic education" on or before July 1, 1981. Id. at 484, 585 P.2d at 77. The State has taken several steps in partial satisfaction of this duty.

Initiative 350, however, is irrelevant to the Washington Supreme Court's decision in the State Funding case. Initiative 350 was not adopted to fulfill the State Supreme Court's mandate to the State legislature in the State Funding case. It does not purport to define "basic education" or to fund it fully, but rather seeks to regulate student assignment authority--a subject untouched in Washington's Basic Education Act, c. 359, 1977 Wash. Laws 1606, 1st Ex. Sess., amended by c. 250, 1979 Wash. Laws 2029, 1st Ex. Sess. Far from "virtually eliminating local school district autonomy," the Basic Education Act sets certain minimum standards for local school districts to be eligible for state funding, but leaves most traditional local functions under local control. Those who drafted, proposed and adopted Initiative 350 did not have the State Funding case in mind and there is no evidence in the record, or elsewhere, that they did. Their expressed purpose was to end student transfers for the purpose of achieving racial desegregation in the public schools of Seattle. See Finding of Fact 7.14, Seattle School Dist.

Initiative 350 is not justified by a compelling state interest. Indeed, the State has failed to proffer any such justifying interest. In contrast, Initiative 350 is directly opposed to the compelling state interest in public school racial

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(footnote 4 continued)

No. 1, 473 F. Supp. at 1008. That traditional local function was usurped through the State initiative process. See Finding of Fact 8.2, id. at 1010.

Indeed, the Washington Supreme Court has expressly declared in a unanimous decision that local school districts have existing authority under State law to assign students to other than their nearest or next-nearest schools in order to achieve racial desegregation. Citizens Against Mandatory Bussing v. Palmason, 80 Wash. 2d 445, 495 P.2d 657 (1972). That case, incidentally, was initiated by opponents of an earlier Seattle School District plan for racial desegregation. See Finding of Fact 6.3, Seattle School Dist. No. 1, 473 F. Supp. at 1006.

Even if Washington State law had usurped all local autonomy in all educational decisions, Lee v. Nyquist, which invalidated a statute regulating state officials' authority over student assignment, would still control the result here.

desegregation, DeFunis v. Odegaard, 82 Wash. 2d 11, 34-35, 507 P.2d 1169, 1183 (1973), vacated as moot, 416 U.S. 312 (1974) (per curiam).

The State is simply incorrect when it asserts in its Jurisdictional Statement that the holding of the court of appeals that Initiative 350 creates a racial classification, thereby obviating any inquiry into intent, represents a shift in equal protection analysis which should be reviewed by this Court. On the contrary, this Court has not approved an invidious racial classification since Korematsu v. United States, 323 U.S. 214 (1944).

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), a case relied upon by the State, clearly demonstrates that the court of appeals and the district court properly applied the most recent statement of equal protection analysis:

> Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. Brown v. Board of Education, 347 U.S. 483; MacLaughlin v. Florida, 379 U.S. 184.

Id. at 272 (emphasis added).

In the case of Initiative 350, the court of appeals and the district court correctly concluded, based on the evidence, that a racial classification was created. Pursuant to Feeney, that racial classification is presumptively invalid "regardless of purported motivation." As the State has failed to provide "an extraordinary justification" for the racial classification created by Initiative 350, the statute must fall.

Contrary to the State's assertion, James v. Valtierra, 402 U.S. 137 (1971), has no relevance to this case. As the

Court pointed out in Valtierra, California's article XXXIV, unlike the Akron referendum provision in Hunter, requires referendum approval for any low rent public housing project, not only for projects which will be occupied by a racial minority. California's article XXXIV creates no racial classification. Initiative 350, on the other hand, is aimed solely at busing for desegregation. Most, if not all, major nonracial reasons for busing students beyond their nearest or next-nearest schools are allowed under Initiative 350.[5] Furthermore, as the undisputed findings of fact of the district court amply demonstrate, the record shows and the court of appeals confirmed that Initiative 350 in fact "was conceived, drafted,

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[5] The court of appeals concurred in the district court's finding of fact on this issue. Seattle School Dist. No. 1, 633 F.2d at 1344 n.4.

advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments." Seattle School District No. 1, 473 F. Supp. at 1015.

In addition, Hunter v. Erickson and Lee v. Nyquist dispose of Questions I, II, III and VI as articulated by the State in its Jurisdictional Statement, for the following reasons:

Question I. The first question raised by the State is whether a desegregation program, once it is underway, may ever be discontinued without violating the fourteenth amendment, even in the absence of any constitutional duty on the part of a local school board to implement such a desegregation program in the first instance.

There may well be situations in which a local school board decision to voluntarily desegregate may be rescinded without violating the fourteenth amendment. See Dayton Board of Education v. Brinkman, 433 U.S. 406, 413 (1977) (rescission of resolutions pledging desegregation, where prior to implementation of desegregation program, not in and of itself unconstitutional): "The Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. Reitman v. Mulkey. . . ."

But such a program may not be discontinued by the passage of state legislation which creates an impermissible racial classification. As the court of appeals and the district court recognized, Initiative 350 creates such an impermissible racial classification. Hunter and Lee

clearly resolve the question raised by the State, at least as applicable to Initiative 350.

Question II. The second question raised by the State asks whether a preexisting "racially neutral neighborhood school assignment policy" may only be restored by a local school board or whether it may also be restored by a State.

Again, it is possible such a restoration may occur without violating constitutional prohibitions.[6] Initiative 350, however, does not restore a "racially neutral neighborhood school assignment policy." On the contrary, as the court of appeals and the district court recognized,

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[6] As the State points out in its Jurisdictional Statement at p. 6, whether racially neutral student assignment policies preceded the School Districts' desegregation programs, such that they could be "restored," is a question that was not addressed in the district court, but rather left for "Phase II" of the litigation should Initiative 350 be declared constitutional.

it creates a racial classification. Initiative 350 mandates a neighborhood school policy only for desegregation purposes. For all other purposes, local school boards remain empowered to assign students beyond their nearest or next-nearest schools. Because Initiative 350 creates a racially biased neighborhood school assignment policy, Hunter and Lee require the conclusion it violates the prohibitions of the fourteenth amendment.

Question III. The third question raised by the State is whether a state statute which does not "explicitly" use race as a criterion nevertheless creates an impermissible racial classification because it addresses a racial issue. This issue was clearly answered by the court of appeals:

> Initiative 350 implicitly effects precisely the same classification which was made explicit in Lee; the law treats a single purpose for

> student assignment, racial balancing, differently from all others. Though Initiative 350 creates the differential classification indirectly by omission, there is no basis for distinguishing it as a matter of constitutional law from the explicit classifications of Hunter and Lee. Unless this court affirms the relevancy of the constitutional analysis applied in Hunter and Lee to this case, the guarantee of equal protection of laws will become a hollow shell. Lawmakers who seek to establish impermissible racial classifications will in the future be able to achieve, by artfully worded statutes like Initiative 350, constitutionally forbidden goals.

633 F.2d at 1344.

Question VI. Finally, in its Question VI, the State asserts there is no invidious racial classification created by Initiative 350, because the Initiative is patterned after federal statutes which have been judicially upheld. The court of appeals, however, also clearly answered this question.

> Although the statutory language of Initiative 350 and the Eagleton-Biden amendment [anti-busing rider

> to HEW appropriation] are superficially similar, the operative and intended effects of the statutes are vastly different. The Title VI amendments were merely an internal administrative housekeeping measure designed to limit HEW's ability to order mandatory busing.

633 F.2d at 1347.

The court of appeals noted that Congress, in enacting the federal statutes to which the State refers, simply wanted to insure that mandatory busing orders derived either from local school officials or federal courts. Unlike Initiative 350, these federal statutes do not create impermissible racial classifications.

Moreover, the Equal Educational Opportunity Act of 1974 explicitly preserves, in deference to Brown v. Board of Education (Brown II), 349 U.S. 294, 299 (1955), the authority of local school districts to desegregate:

> Nothing in this part prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise

> lawful, that is at variance with the standards set out in this part nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this part, if such plan is voluntarily proposed by the appropriate educational agency.

20 U.S.C. § 1716.

In Brown v. Califano, 627 F.2d 1221 (D.C. Cir. 1980), the court of appeals noted that the Eagleton-Biden amendment does not involve a flat prohibition against involuntary busing. The court emphasized that local school officials, for example, still may voluntarily employ transportation to desegregate. All reasonable desegregation methods remain available to school officials, to the Justice Department, and to the courts. If there had been such a blanket prohibition against desegregation, the court implied, the amendment would not survive constitutional scrutiny.

As the court of appeals in this case pointed out, Initiative 350, unlike the

Eagleton-Biden amendment and the Equal Educational Opportunity Act of 1974, flatly prohibits local officials from busing beyond neighborhood schools if the purpose is to desegregate the schools. Busing beyond neighborhood schools for all other significant reasons is permitted. Because Initiative 350 does preclude local school authorities from voluntarily busing to achieve desegregation, and does so via a statute that embodies a burdensome racial classification in violation of the principles of Hunter and Lee, Brown v. Califano is inapposite. There is no need to harmonize these decisions further; they are consistent.[7]

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[7] California's Proposition I, while similar to Initiative 350 in origin and purpose, expressly preserves the authority of local school boards to desegregate, and at least in that sense is the very antithesis of Initiative 350, which forbids student assignment for desegregation. Crawford v. Board of Education, 113 Cal. App 3d 633, 170 Cal. Rptr. 495 (1980), petition for

Hunter v. Erickson and Lee v. Nyquist clearly govern the disposition of this case. No substantial federal questions are raised. Thus, this Court should dismiss the State's appeal or, alternatively, affirm the court of appeals' determination.

B. Initiative 350 is Unconstitutional Because It Was Adopted With a Racially Discriminatory Purpose.

The district court correctly concluded that even if Initiative 350 is not regarded as creating an impermissible racial classification on its face, fourteenth amendment tests formulated by the Supreme Court invalidate it. The court of appeals did not address this issue.

In Village of Arlington Heights v. Metropolitan Housing Development Corp., 429

(footnote 7 continued)

hearing denied, (Cal. March 11, 1981), petition for cert. filed, (U.S. July 8, 1981) (No. 81-38).

U.S. 252 (1977), the Court set out the following factors as indices of whether a particular governmental action is impermissibly infused with discriminatory intent:

(a) The impact of the action, i.e., whether it bears more heavily on one race than another;

(b) the historical background of the decision;

(c) the specific sequence of events leading to the decision;

(d) the procedural and substantive departures from the norm in connection with the decision or action; and

(e) the legislative or administrative history of a decision or action. Id. at 266-68.

Substantial evidence supports the district court's conclusion that Initiative 350 is purposefully segregative and discriminatory, and constitutes an equal protection violation under the tests set

forth in Arlington Heights. The district court's findings of fact in this regard are undisputed.

First, the district court recognized that the negative impact of Initiative 350 on minorities is plainly seen in the demonstrable, easily foreseeable dramatic increase in school segregation, and consequent educational impairments, which Initiative 350 would cause in Seattle. No longer will the inconvenience of desegregation be shared equitably between minority and majority students.

Second, the district court found the historical background of Initiative 350, the sequence of events leading to its enactment, and the legislative and administrative history of the Initiative make clear the measure's intent to undo Seattle's desegregation plan. Indeed, the State in its Jurisdictional Statement at

page 4 admits this was the intent of Initiative 350.

Third, as to procedural and substantive departures from the norm in connection with enactment of the Initiative, the district court concluded that Initiative 350 uses the statewide initiative process to deal with a local school district matter. This is a definite departure from the norm. Furthermore, an additional departure from the norm is the State's removal from local school districts of the power to decide whether to assign students beyond their nearest or next-nearest schools for purposes of desegregation, while allowing local school districts discretion to reassign students manditorily for all other major purposes.

As the district court recognized, the above plainly shows that the impermissible purposes of frustrating desegregation and

treating racial student assignments differently from nonracial student assignments were among the motivating factors behind the creation and adoption of Initiative 350. Initiative 350 invidiously discriminates against efforts to promote equal educational opportunity by reducing racial imbalance in the schools. This purpose is impermissible. Lee v. Nyquist, 318 F. Supp. at 720.

Where discriminatory purpose is a motivating factor of legislation, judicial deference to legislative decisions is "no longer justified." Arlington Heights, 429 U.S. at 265-66. Since an impermissible purpose was a motivating factor in the adoption of Initiative 350, the burden shifts to defendants to prove the same statute would have been adopted in the same manner at the same time even in the absence of the impermissible purpose. Arlington Heights, 429 U.S. at 270 n.21. The State

failed to produce any evidence that Initiative 350 would have been enacted in November 1978 wholly apart from its purpose to stop the Seattle Plan for desegregation. The State therefore failed to meet its burden under Arlington Heights. Ayers v. Western Line Consolidated School District, 555 F.2d 1309, 1315 (5th Cir. 1977), vacated in part and remanded on other grounds sub nom. Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).

Question IV raised by the State in its Jurisdictional Statement is misleading. It asks merely whether statutory restoration of a neighborhood school assignment policy constitutes racially discriminatory State action. As the Ninth Circuit held in Diaz v. San Jose Unified School District, 612 F.2d 411 (9th Cir. 1979), a neighborhood school policy in and of itself has no constitutional significance.

A penetrating examination of the complete context in which the neighborhood school policy was initially applied and subsequently enforced must be conducted to determine the presence or absence of a racially discriminatory purpose. In the case of Initiative 350, no neutral neighborhood school assignment policy is created. In fact, Initiative 350 creates a neighborhood school assignment policy only for desegregation; all other purposes of student assignment beyond nearest or next-nearest schools are allowed to remain.

In its inquiry into the purpose of Initiative 350, the district court considered foreseeable and anticipated disparate racial impact as evidence to prove the ultimate fact, racially discriminatory purpose. The State asserts this procedure is contrary to law.

This Court, however, in the Columbus case, clearly affirms the district court's method:

> [T]he District Court correctly noted that actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. Those cases do not forbid "the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn." Id., at 255. Adherence to a particular policy or practice, "with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn." Ibid. The District Court thus stayed well within the requirements of Washington v. Davis and Arlington Heights. See Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 n.25, (1979).

Columbus Board of Education v. Penick, 443 U.S. 449, 464-65 (1979).

The district court fully complied with applicable tests to determine the purpose of Initiative 350. The State has failed to raise a substantial federal question.

In addition, the State incorrectly maintains the district court refused to consider offered evidence of the allegedly benign subjective intent of the electorate. In fact, the district court denied the School Districts' motion in limine at trial to exclude evidence of the subjective intent of the electorate. The record is replete with such evidence, although its trustworthiness is slight. Much testimony revealed the unreliability of the State's evidence. See, e.g., Ex. 128; Ex. A-133, pp. ix-x, 13-14, 32-40; Ex. 37, pp. 108-18; Transcript 349-51, 1185, 1289-344, 1351-69, 1435-42. Indeed, the district court made specific findings of fact relating to the subjective intent of the electorate. E.g., Findings of Fact 7.30, 7.32, 7.33. And the district court emphasized its decision was rendered only "[a]fter considering all of the evidence . . . ." Seattle School District No. 1, 473 F. Supp. at 1012.

In summary, the district court's conclusion that Initiative 350 is invalid because it was adopted at least in part due to a racially discriminatory purpose is based on substantial evidence and should be affirmed, consistent with Columbus. The district court considered all the evidence, subjective as well as objective (contrary to the State's assertions), analyzing the purpose of Initiative 350 pursuant to the tests recently set forth by this Court. In the context of all the evidence, the discriminatory purpose of Initiative 350 is clear.

On this issue, also, the State's appeal should be dismissed as not raising a substantial federal question. Alternatively, the lower court decision should be affirmed.

C. Initiative 350 is Unconstitutional Because it is Overinclusive.

The district court correctly recognized that Initiative 350 is overly

inclusive. The statute prohibits all district-directed extra-neighborhood desegregation assignments (except pursuant to court order) regardless of whether there is any constitutional duty to desegregate. The court of appeals did not address this issue.

Overinclusive statutes impinging upon important rights (such as the right to equal protection of the laws) are invalid. See, e.g., Lewis v. City of New Orleans, 415 U.S. 130 (1974) (speech); Eisenstadt v. Baird, 405 U.S. 438 (1972) (equal protection; privacy/contraception); United States v. Robel, 389 U.S. 258 (1967) (association); Carrington v. Rash, 380 U.S. 89 (1965) (voting); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (travel); see generally Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 351-53 (1949).

Initiative 350's overinclusiveness conflicts with principles considered fundamental since the original Brown school desegregation litigation. Local school authorities have the primary responsibility to assure the equal protection rights of students. Brown v. Board of Education (Brown II), 349 U.S. 294, 299 (1955). Local autonomy of school districts is a vital national tradition. Dayton Board of Education v. Brinkman, 433 U.S. 406, 410 (1977); Milliken v. Bradley, 418 U.S. 717, 741-42 (1974). Limitations on the student assignment powers of local school districts operate "to inhibit or obstruct the operation of a unitary school system," North Carolina Board of Education v. Swann, 402 U.S. 43, 45 (1971), and must therefore fall. Bradley v. Milliken, 433 F.2d 897, 903 (6th Cir. 1970); Santa Barbara School District v. Superior Court,

13 Cal. 3d 315, 530 P.2d 605, 613-15, 118 Cal. Rptr. 637 (1975).

Moreover, Initiative 350 prevents local school districts from voluntarily desegregating their schools as a matter of educational policy in order to prepare students to live in a pluralistic society [Finding of Fact 8.10], contrary to the teaching of Swann v. Charlotte-Mecklenburg Board of Education:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . . .

402 U.S. 1, 16 (1971). Cf. Ex. 12 (Seattle School District Resolution 1977-28); 20 U.S.C. § 1716 (1976).

Because Initiative 350 removes local school district discretion to assign students to reduce racial imbalance, common sense dictates that it is facially unconstitutional. Local school districts cannot carry out their primary responsibility to safeguard equal protection rights under Brown II, and simultaneously maintain local autonomy, if they are totally deprived of the one tool--student reassignment--which courts often find is the only method by which constitutional duties may be satisfied.

The State has purported to adopt an interpretation of Initiative 350 that would free local school districts to desegregate their schools if constitutionally required. As a result, the State argues, the Initiative is not overinclusive. See Question VII raised in the State's Jurisdictional Statement.

This argument would be attractive were it not for the clear language of Initiative 350. That language states explicitly local school districts shall not assign students beyond their nearest or next-nearest schools for desegregation, unless required to do so by a court order.

Courts are not free to adopt an interpretation of a statute which is contrary to the clear meaning of its language. Adams v. Morton, 581 F.2d 1314, 1320 (9th Cir. 1978), cert. denied, 440 U.S. 958 (1979). The district court did adopt the construction of the statute intended by its proponents. Because the State's interpretation has no basis in the language or "legislative history" of Initiative 350, the court is not free to adopt it.

Thus, the district court's conclusion that Initiative 350 is constitutionally

infirm because it is overly inclusive is correct, and should be affirmed.

No substantial federal question is raised by the district court's ruling. Thus, the Supreme Court should dismiss the State's appeal or, in the alternative, affirm the ruling of the court of appeals.

D. The Court of Appeals Correctly Ruled in Granting Successful School District Plaintiffs Their Costs and Attorneys' Fees.

The court of appeals correctly concluded that the general Attorney's Fees Statute, 42 U.S.C. § 1988, and the statute dealing specifically with school desegregation cases, 20 U.S.C. § 3205, justified an award of attorneys' fees in this case to successful school district plaintiffs.

This Court has interpreted these statutes as requiring "the successful plaintiff should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust.'" Northcross

v. Board of Education, 412 U.S. 427, 428 (1973), quoting Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968). Given the quarter century of judicial encouragement of local school districts to recognize their constitutional obligations in this area, it would be surprising indeed if local school boards' protection of the constitutional rights of students were now considered a "special circumstance." Such school board behavior should be the norm.

The court of appeals noted the congressional purpose in providing attorneys' fees in civil rights cases was to eliminate financial barriers to the vindication of constitutional rights and to stimulate voluntary compliance with the law. There is nothing in the language or the legislative history of the statutes indicating a congressional intent to limit attorneys' fees to private parties. So long as a

publicly funded organization advances important constitutional values, it is eligible for fees under the statutes. See Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980); Aho v. Clark, 608 F.2d 365 (9th Cir. 1979); Oldhan v. Erhlich, 617 F.2d 163 (8th Cir. 1980); Palmigiano v. Garrahy, 616 F.2d 598 (1st Cir. 1980), cert. denied, 101 S. Ct. 115 (1980); Holley v. Lavine, 605 F.2d 638 (2d Cir. 1979), cert. denied sub. nom. Blum v. Holley, 446 U.S. 913 (1980); Weisenberger v. Huecker, 593 F.2d 49 (6th Cir.), cert. denied, 444 U.S. 880 (1979).

It is incorrect for the State to assert that it has already funded this litigation. Both State appropriations to local school districts and funds raised locally by voter-approved property tax levies are used to support the budgets of the School Districts, including their relatively minor litigation budgets. All funds not used for litigation purposes are

available for their intended and rightful purpose--the education of the schoolchildren of the School Districts. In this case, an award of attorneys' fees to the School Districts will go directly to the benefit of the schoolchildren of the School Districts. Education should not be diminished by expenditures necessary to resist unconstitutional State laws.

It should also be pointed out that at the very beginning of this litigation, the School Districts made a formal demand that the State of Washington fulfill its constitutional duty to challenge Initiative 350. Had the State responded as then demanded, it would not now be liable for the School Districts' attorneys' fees.

Moreover, Congress has already determined the policy applicable to this case. In adopting the Civil Rights Attorneys' Fee Award Act, 42 U.S.C. § 1988 (1976), Congress determined the public interest is

served by encouraging litigation enforcing the Civil Rights Statutes. See Seattle School District No. 1, 633 F.2d at 1348. The State's policy arguments must fall to this congressional determination.

No substantial federal issue is raised by the State's appeal concerning attorneys' fees. Thus, the Supreme Court should dismiss the State's appeal, or, in the alternative, affirm the ruling of the court of appeals.

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or affirmed.

DATED this 24th day of July, 1981.

Respectfully submitted,

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APPENDIX A

ADDITIONAL STATUTORY PROVISIONS

42 U.S.C. § 1983 1979 Supp. (III)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 2000d (1976) (Title VI, 1964 Civil Rights Act)

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.